

Commissioner, Indiana Department of Environmental Management, Case 2008-18001-W

v.

Bret D. Aker, Class II Operator's Certificate No. 13315, Class A Operator's Certificate No. 17629, Grade DSM Operator's Certificate No. 947246 and Grade WT3 Operator's Certificate No. 947247,
Pierceton, Kosciusko County, Indiana
2010 OEA 125, (08-W-J-4174)

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 125 cite this as
IDEM v. Bret Aker, 2010 OEA 125.

TOPICS:

wastewater treatment plant	records on-site
water distribution system	flow meter
Certified operator	power source
Class II Operator's Certificate	NPDES permit
Class A Operator's Certificate	effluent limits
Grade DSN Operator's Certificate	pump
Grade WT3 Operator's Certificate	excess sludge
direct or responsible charge	IDEM records
Discharge Monitoring Report (DMR)	violations
Monthly Reports of Operation (MRO)	computer system
laboratory results	I.C. § 13-18-11-8
sampling record	327 IAC 8-12-8

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: April D. Lashbrook, Esq.
Respondent: Bret D. Aker, pro se

ORDER ISSUED:

August 30, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

v.

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FINDINGS OF FACT

1. Bret D. Aker ("Aker" or "Mr. Aker") held the following IDEM-issued certifications, per 327 IAC 5-22:
 - a. Class II Operator's Certificate No. 133150, issued June 14, 1996, most recent renewal effective date of July 1, 2008, expires June 30, 2010, later renewed;
 - b. Class A Operator's Certificate No. 17629, issued February 27, 2006, most recent renewal effective date of May 20, 2008, expires June 30, 2009;
 - c. Water Distribution Operator's Certificate Grade DSM No. 947245, issued November 19, 1994, most recent renewal effective date of July 1, 2008; and
 - d. Water Treatment Plant Operator's Certificate Grade WT3 No. 947246, issued November 19, 1994, expiring June 30, 2011. *See Testimony of Mary Hollingsworth, IDEM Office of Water Quality, Section Chief, Drinking Water Branch.*
2. From March, 2004 to June, 2007, Mr. Aker was the wastewater treatment plant certified operator of record, for the following Kosciusko County, Indiana facilities:
 - a. Suburban Acres Mobile Home Park, NPDES Permit No. IN 0025208;
 - b. Millwood Acres Mobile Home Park, NPDES Permit No. IN 0036412; and
 - c. Town of Pierceton, NPDES Permit No. IN 0020541.

Complainant's Exs. B, C, D; See Testimonies of Barbara McDowell, IDEM Section Chief, Office of Water Quality Compliance Branch, Jeffrey Ewick, IDEM Section Chief, Office of Water Quality and Information Services, Michael Kuss, IDEM Senior Environmental Engineer, IDEM Northern Regional Office. As certified operator for these wastewater facilities, Mr. Aker was the person in direct or responsible charge of the wastewater treatment facilities for Suburban Acres Mobile Home Park, Millwood Acres Mobile Home Park, and the Town of Pierceton. See Testimony of Barbara McDowell.

3. From January, 2007 through December, 2007, Mr. Aker was the wastewater distribution and water treatment plant certified operator of record for the following Kosciusko County, Indiana facilities:
 - a. Millwood Acres Mobile Home Park, PWSID No. IN 5243016;
 - b. New Life Christian Church & World Outreach facility, PWSID No. IN 2430055.

See Testimony of Mary Hollingsworth. As certified operator for the public water supply facilities, Mr. Aker was the person in direct or responsible charge for the operation of the water distribution and water treatment facilities for Millwood Acres Mobile Home Park and New Life Christian Church & World Outreach facility. See Testimony of Mary Hollingsworth.

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4. For Suburban Acres and Millwood Acres Mobile Home Parks wastewater treatment facilities, Mr. Aker did not claim to submit, and IDEM did not receive, required monthly Discharge Monitoring Reports ("DMR") and Monthly Reports of Operation ("MRO"), from April, 2004 through March, 2008. *Complainant's Ex. E; Testimonies of Barbara McDowell, Jeffrey Ewick, Bret Aker.*
5. During IDEM staff's May 8, 2008 inspection of Millwood Acres Mobile Home Park's wastewater treatment facility, neither DMRs nor MROs were available on site, and no laboratory or sampling records were on site. *Complainant's Ex. N; Testimony of Michael Kuss.*
6. At the Suburban Acres Mobile Home Park's wastewater treatment facilities, on May 1, 2008, IDEM staff inspected the facilities, and rated the facility and maintenance as unsatisfactory. Specifically, the flow meter was not in service, and an alternative power source was not installed. The facility reported that in April and July, 2006, it had exceeded its NPDES permit numeric effluent limitations for *E. coli* bacteria. As stated in enumerated ¶ 4, above, DMRs and MROs for April, 2004 through March, 2008. *Complainant's Ex. P; Testimony of Michael Kuss.* Mr. Aker did not present substantial evidence to refute the results of IDEM's inspection. *Testimony of Bret Aker.*
7. At the Millwood Acres Mobile Home Park's wastewater treatment facilities, on May 8, 2008, IDEM staff inspected the facilities, and evaluated the effluent appearance as unsatisfactory for being turbid. Operation and maintenance were unsatisfactory for reasons including a blower was out of service, one pump was out of service, excessive sludge had built up in the pond, and there were no records of maintenance. Unsatisfactory ratings were issued to the self-monitoring program, the laboratory, and the records/reports, due to the above-noted missing DMRs, MRO's, and laboratory and sampling records. *Complainant's Ex. Q; Testimony of Michael Kuss.* Mr. Aker did not present substantial evidence to refute the results of IDEM's inspection. *Testimony of Bret Aker.*
8. For the Town of Princeton wastewater treatment facilities, Mr. Aker did not submit monthly DMR and MRO reports for November, 2006, December, 2006, February, 2007, November, 2007, and January, 2008. These reports were due by the 28th of the month following the reported month. *Complainant's Ex. 0; Testimonies of Barbara McDowell, Jeffrey Ewick, Michael Kuss.* Mr. Aker did not present substantial evidence to refute the results of IDEM's inspection. *Testimony of Bret Aker.*

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9. Mr. Aker testified that IDEM's recordkeeping and organization was in disarray, and thus urged the Court to find that IDEM assertions that records were missing was due to IDEM's own inability to locate records. Prior to her retirement five years ago, on occasion IDEM's Elizabeth Brown would call Mr. Aker as a courtesy to remind him that some DMRs or MROs had not yet been received. *Testimonies of Elizabeth Brown, Bret Aker*. During the period when IDEM alleged that Mr. Aker failed to submit required reports, IDEM was in the process of converting its recordkeeping system to a computer based system. *Testimony of Jeffery Ewick*. Despite the conversion process IDEM staff had no recollection of a time when multiple documents were missing. *Id.* Mr. Aker further testified that in some instances, the facility owners refused to maintain records on-site. *Testimony of Bret Aker*. IDEM stated that if an owner does not comply with facility requirements, then the operator "should notify IDEM and let them know that you are having issues and that they are unwilling to comply with the permit." *Testimony of Michael Kuss, Final Hearing Trans., p. 44*. Mr. Aker further testified that he was relieved of his operator duties for New Life Christian Church & Outreach facility. *Testimony of Mr. Aker*. IDEM stated that if an operator is relieved of duty, that operator is required to notify IDEM, a duty repeated on IDEM correspondence. *Testimony of Mary Hollingsworth*. Mr. Aker did not submit written notice to IDEM that he was no longer the certified operator responsible for New Life Christian Church & Outreach facility. *Id., final hearing trans. at 55*. Mr. Aker asserted that IDEM staff told him that certain violations would be removed from his records. *Trans. of Final Hearing*. At final hearing, Mr. Aker asked multiple witnesses whether they agreed to remove violations from his record, or had been told by other staff members to remove the violations. *Id.* IDEM witnesses consistently denied stating, or being told by other IDEM staff, that certain violations would be removed from Mr. Aker's records. *Id.*

10. IDEM operator certification records showed that Mr. Aker's operator certifications expired on July 1, 2004, then renewed on September 29, 2004, expired on July 1, 2006 then renewed on March 1, 2007. *Complainant's Ex. F, G*. Although Mr. Aker had no valid certifications during the periods when his certifications expired, he signed reports for the Town of Pierceton wastewater treatment facility as certified operator, and continued to act as certified operator for Suburban Acres Mobile Home Park and Millwood Acres Mobile Home Park wastewater treatment facilities. *Complainant's Ex. H, I; Testimony of Barbara McDowell*. Mr. Aker testified that he attempted to renew his certification before March 1, 2007, but did not present substantial evidence to refute IDEM's claims that he was certified during these periods, or did not so act. *Testimony of Bret Aker*.

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11. For the Millwood Acres Mobile Home Park's water distribution and water treatment plant, Mr. Aker did not monitor and report the required sampling for lead and copper during 2007, and did not monitor and report the required sampling for arsenic during the April through June, 2007 quarterly sampling period. *Complainant's Ex. R, T, U, V, X; Testimony of Mary Hollingsworth*. Mr. Aker submitted IDEM's letter noting Lead Action Level Exceedance for the monitoring period June 1 to September 30, 2007. *Respondent's Ex. 7, Testimony of Bret Aker*. In his September 5, 2009 Closing Statement, Mr. Aker stated that as Millwood Acres did not forward IDEM's letters requesting missing periodic sampling, then he did not collect the samples for lead or arsenic. *Id.*
12. For the New Life Christian Church & World Outreach facility water distribution and water treatment plant, records show that Mr. Aker did not monitor and report the required sampling for Total Coliform bacteria during the July through September, 2007 quarterly sampling period. *Complainant's Ex. S, W; Testimony of Mary Hollingsworth*. Respondent submitted a letter from the facility that he was dismissed in July, 2007. *Respondent's Ex. 9.*

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is charged with implementation and enforcement of Indiana's environmental laws and rules. I.C. § 13-13-1-1, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction for administrative review of the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7-3.
2. This is a Final Order issued pursuant to I.C. § 4-21.5-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ"), and deference to the agency's initial factual determination is not allowed. *Id.*; I.C. § 4-21.5-3-27(d). "The ELJ . . . serves as the trier of fact in an administrative hearing and a *de novo* review at that level is necessary. *Indiana Department of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100, 103 (Ind. 1993). The ELJ does not give deference to the initial determination of the agency." *Indiana-Kentucky Elec. Corp v. Comm'r, Ind. Dep't of Env'tl. Mgmt.*, 820 N.E.2d 771 (Ind. Ct. App. 2005). "*De novo* review" means that "all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of

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any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind.Ct.App. 1981).”

4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also*, I.C. § 4-21.5-3-27(d). OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” I.C. § 4-21.5-3-23(b). The applicable standard of proof generally has been described as a continuum with levels ranging from a “preponderance of the evidence test” to a “beyond a reasonable doubt” test. The “clear and convincing evidence” test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test. *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The “substantial evidence” standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind.Ct.App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12, *Marathon Point Service and Winamac Service*, 2005 OEA 26, 41.
5. In his August 23, 2010 Response to IDEM's July 29, 2010 Motion for Status Conference or Ruling, Mr. Akers contends that judgment in this cause is precluded if not issued within ninety (90) days. No supporting legal authority was presented by Mr. Akers for this contention, none was discovered by IDEM or the Court. A review of the hearing transcript provided by IDEM on August 25, 2010, along with IDEM's Reply, this Court made no specific ruling authorizing Mr. Aker's contention. Mr. Aker's contention lacks supportive legal authority and is **denied**. Mr. Aker's request to reopen the record is based upon new evidence that a witness lied, but is not based on specific information, nor on any allegation which, if true, could not have been presented when the record was open. Mr. Aker's request to reopen the record is **denied**.
6. I.C. § 13-18-11-8 requires:
 - (a) The [IDEM] commissioner may suspend or revoke the certificate of an operator, following a hearing under I.C. § 13-15-7-3 and I.C. § 4-21.5, if any of the following conditions are found:
 - (1) The operator has practiced fraud or deception.
 - (2) Reasonable care, judgment, or the application of the operator's knowledge or ability was not used in the performance of the operator's duties.
 - (3) The operator is incompetent or unable to properly perform the operator's duties.
 - (b) A hearing and further proceedings shall be conducted in accordance with I.C. § 4-21.5-7.'s design complies with 327 IAC 16-8-4.

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7. For wastewater, 327 IAC 8-12-8 provides that the commissioner may suspend or revoke the certificate of any operator, following a hearing under I.C. § 4-21.5, *et seq.*, if it found that the operator has violated any of the provisions of I.C. § 13-18-11-8.
8. For drinking water, 327 IAC 8-12-8 provides that the commissioner may suspend or revoke the certificate of a water treatment plant or water distribution system certified operator, following a hearing under I.C. § 4-21.5, *et seq.*, if it found that the operator has violated any of the provisions of I.C. § 13-18-11-8.
9. Substantial evidence shows that Respondent, Mr. Aker, as certified operator of record for the wastewater facilities and for the water treatment and distribution facilities, failed to exercise reasonable care in the performance of his duties at Suburban Acres Mobile Home Park, Millwood Acres Mobile Home Park, Town of Pierceton wastewater treatment facilities, and New Life Christian Church & World Outreach facility. As certified operator of record, Mr. Aker was required to submit discharge monitoring reports, monthly reports of operation, and drinking water sampling results, in compliance with the appropriate regulatory schedule, as an integral part of a regulatory system which attempts to ensure compliance through the use of trained and certified operators who have sufficient objectivity and skill to allow facilities to monitor themselves. Substantial evidence shows that Mr. Aker failed to submit required periodic reports for four years for the two mobile home parks. For the Town of Pierceton, and for the drinking water facilities at Millwood Acres Mobile Home Park and for New Life Christian Church & World Outreach facility, substantial evidence was presented that periodically, Mr. Aker periodic failures to submit required reports. The periodic reporting and testing deadlines stated in the regulatory program regulations are not dependent on whether a facility forwards its mail to an operator, or whether IDEM staff contact an operator with reminders of required duties. By these failures, Mr. Aker neglected his duties as an operator, showing a failure to exercise reasonable care in the performance of these duties, along with incompetence or inability to properly perform his duties.
10. Complainant IDEM has the burden of proof on any of its allegations. The Court finds that IDEM's witnesses had more credibility on the issues of record submission and maintenance due to their familiarity with Indiana's requirements for records submissions and retrieval, and these witnesses showed more care and effort in verifying whether records were available. Respondent, Bret Aker, failed to produce substantial evidence that records were erroneously reported as missing, based on organization of IDEM's recordkeeping.
11. Complainant IDEM presented substantial evidence that grounds exist to revoke Class II Operator's Certificate No. 133150, Class A Operator's Certificate No. 17629, Water Distribution Operator's Certificate Grade DSM No. 947245, and Water Treatment Plant Operator's Certificate Grade WT3 No. 947246, issued to Bret D. Aker.

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FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Complainant, Commissioner, Indiana Department of Environmental Management, met its burden of proof and of persuasion that Respondent, Bret D. Aker, failed to exercise reasonable care, and was incompetent or unable to properly perform duties of a certified operation, in violation of I.C. § 13-18-11-8. Indiana Department of Environmental Management may make a determination to revoke Respondent, Bret D. Aker's Class II Operator's Certificate No. 133150, Class A Operator's Certificate No. 17629, Water Distribution Operator's Certificate Grade DSM No. 947245, and Water Treatment Plant Operator's Certificate Grade WT3 No. 947246.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that relief request in Complainant's September 16, 2008 Request for Administrative Hearing is **GRANTED**. Judgment is entered in favor of Complainant, Commissioner, Indiana Department of Environmental Management, against Respondent Bret D. Aker. All further proceedings before the Office of Environmental Adjudication are hereby **VACATED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 30th day of August, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge